BEFORE THE

Federal Communications Commission

In the Matter of)
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THE TELEPHONE CONSUMER)
PROTECTION ACT OF 1991)

CC Docket No. 92-90

REPLY COMMENTS
OF THE DIRECT MARKETING ASSOCIATION

The record in this proceeding establishes unequivocally that the only "efficient and effective means" of implementing the Telephone Consumer Protection Act's ("TCPA") provisions designed to protect consumers from unsolicited live operator calls to which they object is a regulatory framework based upon company-specific, in-house, do-not-call programs. The Direct Marketing Association ("DMA") rejoins briefly to those commenting parties who have urged the Commission to reach a contrary conclusion. We will show that these parties misconceive the structure of the TCPA and overlook or fail to address the infirmities of the alternative methods they endorse. In support, the following is stated:

1. The Structure of the TCPA. The TCPA sharply distinguishes between telephone calls that involve an artificial or pre-recorded voice message ("ADRMP"), on the one hand, and telephone solicitation calls that involve a live operator on the other. In the case of ADRMP calls, the statute itself specifies the method to be used to protect consumers from unwanted calls:

subject only to such exceptions as the Commission is permitted to adopt (§ 227(b)(2)(B)), ADRMP calls may be made only with the recipient's "prior express consent." Section 227(b)(1)(B).[1/] By contrast, Congress did not mandate a "prior express consent" requirement with respect to live operator calls. Instead, in the case of live operator calls -- including those placed by means of automated dialing equipment -- Congress specifically instructed the Commission to "compare and evaluate alternative methods" that would enable consumers to avoid receiving those calls "to which they object." Section 227(c).

In obedience to that mandate, the Notice of Proposed Rulemaking in this docket ("NPRM") sets forth a comprehensive list of alternative methods of implementing Section 227(c) of the Act. In formulating these alternatives, the Commission was required to keep in mind that, although the TCPA speaks in terms of subscriber's "privacy rights" (§ 227(c)), the provision is designed simply to provide regulatory assurance (and a means of enforcing such assurance) that businesses engaged in telephone solicitation do not annoy their customers or potential customers. The Commission was required, therefore, to balance the narrow purposes

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1/ As DMA has pointed out in its Initial Comments, we believe the Commission should create an exemption from this requirement for commercial calls that do not contain an advertisement. The legislative history also makes it clear that debt collection calls are not intended to be covered by this prescription. In all other respects, the scope of permitted exemptions from the basic rule with respect to ADRMP calls is extremely limited. Section 227(b)(2)(B).

of the TCPA in application to live operator calls with other public interest values, including the avoidance of unreasonable cost and burden on legitimate business practices and constitutional considerations.[2/] With the exception of a proposal that the Commission establish a "do call" national database -- which is beyond the scope of the TCPA and very probably unconstitutional[3/] -- no commenting party has found an alternative to those enumerated by the Commission.

Despite the mandate that the Commission select the "most effective and efficient" method of protecting consumers from unwanted live operator calls and the absence of alternatives other than those listed in the NPRM, one commenter argues that the Commission should withdraw the NPRM and advance a new proposal "more fully in compliance with the language and intent" of the TCPA.[4/] This claim is without merit. The argument fundamentally blurs the distinction that the TCPA creates between ADRMP calls and live operator calls. It suggests that the remedy mandated by Congress itself for ADRMP calls may -- or indeed must -- also be

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2/ See Comments of the Direct Marketing Association at 32.

3/ A "do call" system is based upon prior express consent; if Congress had intended such a system to be applied to live operator calls, it would have legislated this result, as it did for ADRMP calls. Such a system, in any event, is unconstitutional because -- in the context of live operator calls -- it is far more intrusive upon speech and legitimate business activity than is necessary to fulfill the governmental objective of protecting consumers from telephone solicitations "to which they object." Section 227(c)(1).

4/ See Comments of the National Consumers League at 1.

imposed upon live operator calls. That is not what the TCPA provides; nor is that its intended purpose. If Congress had intended to require "prior express consent" for all telephone solicitation calls, it was certainly capable of drafting legislation to accomplish that objective if it could constitutionally do so. The fact is that Congress, like the Commission, recognizes a distinction, in policy terms, between ADRMP calls containing advertisements and live operator calls. The scope of the proceeding framed in the NPRM is entirely consonant with Section 227(c) of the TCPA.

2. The Most Effective and Efficient Method. The only remaining question to be determined is which of the alternative methods available for implementation of Section 227(c) is "most efficient and effective." The record shows that, both on its own terms and when compared with the alternatives, a regulatory framework based upon company-specific, in-house, do-not-call programs best furthers the purposes of the TCPA without undue intrusion on other values.

There seems to be general agreement among all commenting parties that the regulatory option best suited to accomplish the purposes of TCPA must be "consumer friendly" and readily administrable.[5/] Several parties suggest that costs incurred in implementation and operation of do-not-call requirements would, in

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5/ See, e.g., Comments of the Direct Marketing Association at 11; Comments of the National Consumers League at 15-16.

any event, be borne by telephone marketers and therefore do not enter into the public interest determination.[6/] This is short-sighted. It is true that under any regulatory framework adopted by the Commission, the direct cost of compliance will be borne directly by telephone marketers. However, the cost of compliance will ultimately be reflected in the price of goods and services sold to the public. Ironically, those consumers who enjoy the ease and convenience of marketing by telephone -- and do not require regulatory "protections" -- will bear the cost of regulation. The issue of cost, as well as convenience and administrability, must be taken into account.

The positions advanced by proponents of a national do-not-call database fail to take account of these criteria. First, the record unequivocally demonstrates that the cost of a national database would be substantial.[7/] Second, although proponents of a national database recognize that the regulatory system must be consumer-friendly, they are unable to construct a program that satisfies this requirement. Some commenters candidly acknowledge that the establishment of a national database would create lag time between the addition of a customer's name to the list and the cessation of unwanted calls.[8/] Another suggests that the system be implemented

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6/ See, e.g., Comments of Consumer Action at 11.

7/ See, e.g., Comments of AT&T at 12; Comments of NYNEX Telephone Company at 17.

8/ See, e.g., Comments of Consumer Action at 12.

by permitting consumers to send postcards, available at post offices, to remove their names from telephone solicitation lists.[9/] It does not seem to us that a system which requires consumers to go to a post office and mail a postcard can be characterized as easy for the consumer to use. Such a system would certainly add to lag time.

The proponents of a national database also ignore the fact that such a system would force consumers to an all-or-nothing choice, under which they must either accept all telephone solicitation calls or none. The underlying assumption is that all consumers want no such calls. The facts are otherwise. The record in this proceeding makes it unmistakably clear that many consumers do enjoy the benefits of marketing by telephone and do not wish to have this service denied to them. In directing the Commission to select the "most efficient and effective" means of implementing Section 227(c), Congress recognized as much. It is a part of the Commission's responsibility to see to it that the rights of all consumers -- not just the rights of those who object to some or even all telephone solicitation calls -- are protected by the regulatory approach it adopts.

Third, to the extent that proponents of a national database address the question of administrability and ease of enforcement at all, they do so only by reference to the United States Postal

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9/ See Comments of the National Consumers League at 16.

Service's National Change of Address program ("NCOA").[10/] They reason that, if mail marketers can match their lists against the NCOA, telephone marketers will have no difficulty in performing a similar do-not-call match against a similar list. This assumes, falsely, that mail marketers have had no difficulty in using NCOA. The facts are otherwise: small marketers do not use NCOA because it entails a cost and specialized equipment that they cannot afford.

This reasoning also assumes that the NCOA list is complete, current and accurate in all respects. That is far from the case, particularly with respect to apartment house addresses. The fact is that because of size and centralized administration, any system based upon a national database compounds the probability of error and the risk that the purposes of the TCPA will not be satisfied. Moreover, the format of the database may not be consistent with the formats of telephone marketers, increasing the cost of administration and probability of error. By oversimplifying the administrative difficulties associated with a national database, proponents of this approach fail to recognize that such a regulatory system will not serve the purposes of the TCPA because it will not work.

Accordingly, a regulatory framework based upon a national database entails substantial costs that will ultimately be borne by consumers, is administratively unworkable and essentially unfair

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10/ See, e.g., comments cited supra note 9.

to legitimate businesses and the many consumers who purchase by telephone. It must be rejected.

Virtually all of the infirmities associated with respect to database programs apply equally to the alternative regulatory options, other than a system based upon company-specific, in-house, do-not-call programs. The local exchange carriers are in general agreement that a technology-based system is not feasible and would, in any event, be extremely expensive.[10/] The local exchange carriers also share our assessment that a system based upon special directory markings is not really an alternative.[11/] It is simply a variant on a national do-not-call database. In addition, existing directory lists are updated only infrequently and the problem of lag time identified with respect to the national database would arise in this context as well.

A few commenting parties suggest that the Commission could, or perhaps should, adopt a system of regulation based upon time-of-day restrictions.[12/] But, these parties fail to address the fact that time-of-day restrictions simply are not responsive to the fundamental purpose of Section 227(c) and would, therefore, have to be combined with one of the other alternatives enumerated. Moreover, the fact that some -- but by no means all commentators

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10/ See, e.g., Comments of Southern New England Telephone Company at 4-7.

11/ See, e.g., Comments of BellSouth Corporation at 9.

12/ See, e.g., Comments of the Direct Selling Association at 4.

-- find the calling hours proposed by the Commission to be acceptable only serves to prove our fundamental point that "acceptable" calling hours are dependent upon consumer lifestyles. Those parties who favor the Commission's proposal have evidently concluded that the hours proposed are consonant with the lifestyle of the audience that they reach. Other marketers and the consumers they serve will very likely have different views. The question of reasonable calling hours can be resolved through, and only through, self-regulation and the dynamics of the marketplace.

In short, the only option that satisfies both the literal terms of the TCPA and its purposes is a regulatory framework based upon company-specific, do-not-call lists. Such a system is consumer-friendly: it does not require postcards or other complicated administrative systems for consumers to use; and there is no lag between the request that a consumer's name be removed from the calling list and the cessation of calls from that marketer. The approach also avoids forcing consumers to an all-or-nothing choice. It is readily administrable -- by large and small marketers -- and it is cost effective.

Those parties who object to this proposal do not seem to do so in terms of its merits. They base their position on the generalized proposition that it simply does not go far enough. To some extent, this view is based upon the notion that telephone marketing is "socially absurd"[14/] and should be punished; this claim

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14/ See Comments of Private Citizens, Inc. at 9.

is baseless. Otherwise, objection to company-specific, in-house, do-not-call programs seems to rest upon the view that this approach would be self-administered and therefore ineffective. This view is myopic.

Alone among the options, the company-specific, in-house, do-not-call approach meshes best with the enforcement mechanisms provided in the TCPA. It places responsibility for compliance where it properly belongs -- directly with the telephone marketer or its telephone service agent. Coupled with regulations that assure that telephone marketers are required to maintain and produce evidence of compliance, it facilitates the private cause of action provisions of the TCPA and the Commission's own enforcement responsibilities. By providing that adherence to the Commission's evidentiary requirements creates a rebuttable presumption that the marketer is in compliance with the basic rule, the company-specific approach assures that the affirmative defense provisions of the statute are available to innocent marketers; this offers a safeguard against frivolous litigation.

A regulatory framework based upon company-specific, in-house, do-not-call programs goes as far as is necessary to create regulatory assurance (and a means of enforcing such assurance) that businesses engaged in live operator telephone solicitation do not annoy their customers or potential customers. In application to live operator calls, the TCPA requires no more. Because this approach offers the greatest flexibility to marketer and consumer,

and is the most readily administrable, enforceable and least costly of the options available, it provides the most "reasonable fit" with the Congressional objective in enacting Section 227(c). Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989).

3. Conclusion. For these reasons, as detailed more fully in our initial comments, we urge the Commission to adopt regulations which (i) require companies engaged in telephone marketing to residential consumers to establish and operate in-house, do-not-call lists, (ii) require those companies to maintain appropriate records demonstrating that such programs are properly carried out and (iii) provide that compliance with such evidentiary requirements creates a rebuttable presumption that the marketer is in compliance with the TCPA. DMA believes that this regulatory approach will serve as a federal model for state regulation of intrastate telephone solicitation calls.[14/] In any event, the Commission should make plain that, under Section 2(b) of the Communications Act (of which the TCPA now forms a part),[15/] its jurisdiction with respect to interstate telephone solicitation calls is exclusive. Therefore, at the minimum, regulatory programs established by states with respect to live operator calls that are

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14/ See Comments of the Public Utility Commission of Texas at 2-3 (describing this state's company-specific do-not-call rules).

15/ 47 U.S.C. § 152(b).

inconsistent with the Commission's mandated rules may not be applied to interstate calls.

Respectfully submitted

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